**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|---|---|---|
| **TINA REESE-BECKER** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **BRANDON WOODS RETIREMENT COMM.** | ) | |
| Respondent | ) | Docket No. 1,018,214 |
| | ) | |
| AND | ) | |
| | ) | |
| **AMERICAN HOME ASSURANCE** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent requests review of the February 25, 2005 preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery.

### ISSUES

The respondent admitted claimant suffered accidental injury arising out of and in the course of her employment on June 2, 2004. She was provided medical treatment for her back pain. One of the treating physicians concluded claimant reached maximum medical improvement (MMI) on September 9, 2004, but the nurse case manager sent claimant to see Dr. Chris E. Wilson, who recommended additional epidural injections. Claimant requested the additional medical treatment.

While receiving treatment, the claimant left her employment with respondent because there were times that performing her job exceeded her restrictions. She then obtained a job as an assistant manager with Burger King. At the preliminary hearing, respondent argued that because claimant was treated and released at MMI any additional medical treatment would be the result of injury or aggravation suffered at her subsequent employment. Stated another way, the respondent contended claimant suffered an intervening accident at her new employment.

The Administrative Law Judge (ALJ) found that there was no evidence claimant suffered an intervening accidental injury and ordered respondent to provide claimant additional medical treatment with Dr. Chris Wilson. Interestingly, the ALJ denied admission of an exhibit consisting of surveillance videotape taken of claimant upon the basis it had no probative value. However, the witness who shot the videotape testified, without objection, as to what the videotape depicted and his report detailing the surveillance was admitted into the record.

The respondent appeals asserting that the ALJ erred in finding that claimant's current need for medical treatment was a result of her injury suffered in the course of her employment as a bath aide. Respondent argues claimant had been released from treatment with restrictions against repetitive bending, and it was clear from the videotape evidence that claimant's work at Burger King required repetitive bending. Respondent contends that its liability ended when claimant reached MMI and was released from care on September 9, 2004, and that any treatment needed after September 9, 2004 is the responsibility of claimant's new employer, Burger King, as the job was not within claimant's restrictions and the work performed there aggravated claimant's symptoms. Accordingly, respondent concludes claimant aggravated her condition working for her subsequent employer and as such suffered an intervening accident.

Moreover, respondent contends that by not admitting the videotape surveillance of claimant working at Burger King, the ALJ negatively affected the chance for it to be released from liability, since in its opinion the video clearly proves that the Burger King job caused claimant's current problems. Respondent contends it was error for the ALJ to exclude the videotape. Consequently, respondent requests the ALJ's ruling disallowing the admission of the videotape likewise be reversed.

Claimant argues that the reason she left respondent's employment was because her restrictions were not being met. She testified that her new job did not cause her any problems, and that she did not suffer a new injury as a result of her new employment. She argues respondent is still responsible for her medical treatment as recommended by a doctor upon the nurse case manager's referral. Accordingly, she requests that the ALJ's Order for Medical Treatment be affirmed.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant worked for respondent as a CNA, and her duties at the time of injury were to assist the residents with their bathing. On June 2, 2004, claimant and a co-worker were helping one of the larger residents up to give her a bath. As claimant was maneuvering to lift the resident's legs she felt an instant pain in her low back. She informed her co-worker and they continued with their duties. Claimant then informed respondent and was

sent to see Dr. Chris Fevurly for treatment. Dr. Fevurly diagnosed claimant with acute regional back pain and assigned restrictions of no lifting, no repeated bending with alternate sitting and standing. Therapy and an epidural block were recommended and claimant was sent for an orthopedic consultation with Dr. Wesley Griffitt, who also recommended an epidural block.

On September 9, 2004, Dr. Fevurly released claimant from treatment, but upon the referral of the nurse case manager the claimant was examined by Dr. Wilson on November 18, 2004. Dr. Wilson recommended that claimant undergo one to two additional epidural injections. He indicated that claimant could continue with her new work activities, which should include no lifting more than 20 pounds and continuous bending type functions. He also indicated that following the additional epidural injections, claimant would more than likely be at maximum medical improvement with no incremental permanent partial impairment or assigned permanent restrictions.[1]

While claimant was receiving treatment from Dr. Fevurly the respondent attempted to accommodate her restrictions, but in the end it was not enough and she quit. Claimant then sought employment with Burger King as an assistant manager. She indicated that the job was within her restrictions, and she was able to perform the duties with no problems. Claimant testified that she did not have to bend over very much while working at Burger King, and that although standing causes back pain, the standing at her current job does not cause her back to hurt any more than it did before. Claimant admitted to bending and reaching under a counter for condiments or straws, but noted that this did not require completely bending down. Claimant did agree that she would sometimes crouch down to reach something on a bottom shelf.

Matt Hansen, a private investigator, testified that he conducted surveillance and took videotape of claimant. He noted that initial surveillance on October 10 and 11, 2004, did not reveal much activity. On October 16, 2004, Mr. Hansen conducted additional surveillance, which revealed claimant sweeping the floor when she arrived to work at Burger King. He indicated he observed claimant bending over several times while sweeping and then observed claimant tending the drive through window and bending out to serve the customers. He did not observe claimant lifting.

Respondent contends the claimant had completed treatment for her work related injury and her request for additional treatment is the result of intervening injury or aggravation of her condition while working for her new employer.

In general, the question of whether the claimant suffered a new, separate and distinct accidental injury under workers compensation turns on whether claimant's

---

[1] P.H. Trans., Cl. Ex. 1 at 4.

subsequent work activity at Burger King aggravated, accelerated or intensified the underlying disease or affliction.[2]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,[3] the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

However, the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*,[4] the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[5] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

---

[2] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[3] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[4] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[5] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

In *Graber*,[6] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

Here, the Board finds this circumstance to be more akin to that found in *Gillig*, rather than *Stockman*. Claimant's back condition, while improved, had not completely resolved. Although claimant had been released by one treating physician, claimant had been referred by respondent's nurse case manager to a different physician. Claimant continued to complain of pain and that doctor recommended an additional course of treatment. Claimant testified that her work for her new employer did not worsen her back pain more than what it had been before that employment.

In situations such as this, there is often a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, based upon the record compiled to date, the Board finds that claimant's condition did arise out of her employment with respondent and is a natural consequence of the original injury with respondent. Accordingly, the Board affirms the ALJ's Order for Medical Treatment.

The above conclusions are based upon the evidence presented. Respondent contends the ALJ improperly excluded other evidence which might support a different conclusion. The Board has, on several occasions, held that decisions on admissibility of evidence are not jurisdictional issues.[7]

The ALJ excluded a videotape offered after hearing testimony from the investigator who took the videotape and reviewing the videotape. The claimant's attorney objected solely on the basis that she had not seen the videotape. The ALJ concluded the videotape had no probative value. Because the investigator testified, without objection, regarding what was depicted on the videotape it is seemingly inconsistent that the videotape depiction was excluded.

The respondent may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2). That statute provides in pertinent part:

---

[6] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[7] *Deleon v. Boone Brothers Roofing*, No. 228,525, 1998 WL 462649, (WCAB July 30, 1998); *Ogden v. Evcon Industries Inc.*, No. 230,945, 1998 WL 381567 (WCAB June 23, 1998).

> Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

**WHEREFORE**, it is the finding of the Board that the Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated February 25, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of May 2005.

_____
BOARD MEMBER

c: Sally G. Kelsey, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director